

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MARTIN FLEISHER, AS TRUSTEE OF THE
MICHAEL MOSS IRREVOCABLE LIFE
INSURANCE TRUST II and JONATHAN
BERCK, AS TRUSTEE OF THE JOHN L. LOEB,
JR. INSURANCE TRUST, on behalf of
themselves and all others similarly situated,

Plaintiff,

VS.

PHOENIX LIFE INSURANCE COMPANY,

Defendant.

Civil Action No. 11-cv-8405(CM)

NOTICE OF SUPPLEMENTAL
AUTHORITY IN RELATION TO
PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO
DISMISS

Plaintiffs Martin Fleisher and Jonathan Berck, on behalf of the Michael Moss Irrevocable Life Insurance Trust II, the John L. Loeb Jr. Insurance Trust, and the putative class, respectfully submit this notice of supplemental authority in relation to Defendant Phoenix Life Insurance Company's ("PLIC") Motion to Dismiss dated January 26, 2012, which is currently pending before this Court. *See* D.I. 16.

Plaintiffs submit this notice to bring to the Court’s attention a recent order from the United States District Court for the Central District of California in a related action entitled *U.S. Bank National Association v. PHL Variable Insurance Company*, No. 2:11-cv-09517-ODW, a true and correct copy of which is attached hereto as Exhibit A. The defendant in that action—PHL Variable Insurance Company (“PHL”)—is an affiliate of PLIC that implemented the same cost-of-insurance rate increases that are at issue in the above-captioned case. U.S. Bank National Association (“U.S. Bank”) sued PHL over the first cost-of-insurance rate increase that is at issue in the above-captioned case, and its complaint relies on substantively identical factual allegations

to those made in the above-captioned case. A true and correct copy of the complaint is attached hereto as Exhibit B.¹

On January 25, 2012, PHL filed a partial motion to dismiss the complaint filed by U.S. Bank based on many of the same grounds that PLIC asserted in its motion to dismiss in the above-captioned case, including (1) that the causes of action for breach of contract and breach of the covenant of good faith and fair dealing counts were redundant and (2) that the causes of action for breach of contract and declaratory judgment were redundant. A true and correct copy of PHL's motion to dismiss is attached hereto as Exhibit C.

On April 26, 2012, Judge Wright of the Central District of California issued an order granting in part and denying in part PHL's motion to dismiss in the related action. In the order, Judge Wright denied PHL's motion to dismiss the causes of action for breach of the contractual covenant of good faith and fair dealing and declaratory judgment, finding that such claims were not redundant of the breach of contract claim and that an actual controversy existed. *See* Ex. A at 8 & 12.² As Judge Wright held, the act of increasing insurance rates in order to cause policy holders to lapse policies "may independently constitute bad-faith behavior" in addition to any breach of contract that such conduct represents. *Id.* at 8.

Judge Wright's order provides further support for Plaintiff's opposition to PLIC's motion to dismiss the Second and Fourth Claims for Relief for breach of the covenant of good faith and fair dealing and declaratory judgment. The allegations in the related action also further support Plaintiff's averments that PLIC's conduct was directed at, and has impacted, a broad array of

¹ PHL and PLIC are represented by the same counsel, and PLIC and PHL are producing many of the same documents in both actions. *See* D.I. 24 at ¶ 4 (stipulated protective order allowing coordination and sharing of experts between both cases).

² Judge Wright also dismissed a tort claim that is not alleged in the above-captioned case, and certain other claims on jurisdictional grounds that have no application to the above-captioned case. *See generally* Ex. A.

consumers across the nation, which supports Plaintiff's Third Claim for Relief for Violation of General Business Law § 349.

Dated: April 30, 2012

/s/ Steven G. Sklaver
Jacob W. Buchdahl
Shawn J. Rabin
SUSMAN GODFREY LLP
560 Lexington Avenue, 15th Floor
New York, NY 10022
Tel.: 212-336-8330
Fax: 212-336-8340
jbuchdahl@susmangodfrey.com
rtinio@susmangodfrey.com
srabin@susmangodfrey.com

Steven G. Sklaver (*pro hac vice*)
Ryan C. Kirkpatrick (*pro hac vice*)
SUSMAN GODFREY LLP
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067-6029
Tel: 310-789-3100
Fax: 310-789-3150
ssklaver@susmangodfrey.com
rkirkpatrick@susmangodfrey.com

Attorneys for Plaintiffs and Putative Class